Nos. 82-1822, 82-1930, & 82-1934

In The

Supreme Court of the United States

October Term, 1982

VICTOR D. QUILICI, *Petitioner,*

vs.

VILLAGE OF MORTON GROVE, *Respondent.*

ROBERT STENGL, et al., *Petitioners,*

vs.

VILLAGE OF MORTON GROVE, et al., *Respondents.*

GEORGE L. REICHERT, et al., *Petitioners,*

vs.

VILLAGE OF MORTON GROVE, *Respondent.*

BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Questions Presented for Review

1. Whether the Second Amendment to the United States Constitution should be construed, contrary to settled decisions of this Court, to prohibit a municipality from restricting possession of handguns and other concealable weapons, even though the restrictions in no way impair the operation of the militia.

2. Whether a privacy interest in the home has been incorporated into the Constitution so as to provide a right to residential possession and use of handguns.

3. Whether, despite the significant interests at issue in this case, and the voluntary submission of the case to the federal courts by the parties, the courts below were required to abstain in order to allow for the possibility of consideration by the Illinois Supreme Court of a state constitutional provision that had previously been construed by intermediate state appellate courts.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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Respondents pray that the petitions for writ of certiorari be denied.

ADDITIONAL STATEMENT OF THE CASE

The three petitions for writ of certiorari to which this brief responds arise out of separate actions challenging the constitutionality of Ordinance No. 81-11 of the Village of Morton Grove, Illinois. This ordinance restricts possession of concealable weapons, including handguns, within Morton Grove. The statements of the case presented by petitioners are incomplete or inaccurate in three respects.

First, the petitioners fail to acknowledge the reasons for adoption of the Morton Grove ordinance. As set forth in the preamble to the ordinance, Morton Grove's elected Board of Trustees made the following legislative findings:

> "[I]n order to promote and protect the health and safety and welfare of the public it is necessary to regulate the possession of firearms and other dangerous weapons.
>
> [T]he easy and convenient availability of certain types of firearms and weapons have increased the potentiality of firearms related deaths and injuries.
>
> [H]andguns play a major role in the commission of homicide, aggravated assault, and armed robbery, and accidental injury and death."

(The complete text of the Ordinance is set forth in the Seventh Circuit's opinion, 695 F.2d at 263 n.1. That opinion is reproduced in the appendix of each of the petitions.)

Although the Stengl petition indirectly attacks these findings (Stengl Pet. 22-23 nn.45-46), none of the petitioners challenged them in the district court. To the contrary, when Morton Grove submitted as exhibits in support of its motion for summary judgment in the district court a sampling of the statistical studies supporting the Trustees' findings, petitioners moved to have the exhibits stricken as not meeting the requirements of F. R. Civ. P. 56. Petitioner Stengl, by counsel, agreed that similar materials attached to his summary judgment memorandum would, by the same reasoning, also have to be stricken, and the district court so ordered. (Order, Nov. 3, 1981.) The factual basis for the Trustees' findings thus was not in dispute in the district court.

Second, petitioners mischaracterize the substantive provisions of the ordinance. The Reichert petition states that the ordinance "completely deprives private individuals in Morton Grove of the possession of handguns . . . [t]he ban is total and absolute." (Reichert Pet. 3.) The Stengl petition

contends that Morton Grove enacted the ordinance "to prohibit and confiscate (with certain minimal exceptions) all handguns possessed in the homes of its civilian residents." (Stengl Pet. 3.) In fact, despite its general restriction on the availability of handguns and other concealable weapons, the ordinance does not prohibit anyone from possessing handguns in Morton Grove. All Morton Grove residents are permitted under the ordinance to keep and use handguns at registered gun clubs within the Village (Ordinance, § 2(E)(7)), and the ordinance completely exempts from the challenged prohibitions on-duty members of the armed forces and the National Guard (Ordinance, § 2(E)(3)), as well as licensed gun collectors, peace officers, and others whose occupations require the use of hangdguns (*id.*, §§ 2(E)(1)(2)(4)(5)(6)). Nor is any general confiscation required. Non-exempt residents who had handguns in their homes prior to the effective date of the ordinance were free to sell them or to transfer them to a gun club or a location outside Morton Grove.

Although the ordinance prohibits possession of certain dangerous weapons other than handguns,[1] it imposes no restrictions on possession of standard rifles or shotguns. The ordinance is limited in its scope to the firearms whose "easy and convenient availability" were legislatively found to increase "the potentiality of firearm related deaths and injuries."

Third, the petitioners do not disclose the results of the parallel litigation in the state court system. Prior to filing their action in the district court, petitioners Reichert and Metler joined in an action filed in the Circuit Court of Cook County, Illinois, raising the same state constitutional challenge asserted by all of the petitioners in the district court.

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[1]The specified weapons include bludgeons, blackjacks, sling shots, sand clubs, sand bags, metal knuckles, and switchblade knives (Ordinance § 2(B)(1)); and machine guns, sawed-off shotguns, bombs, bomb-shells, grenades, black powder bombs, Molotov cocktails, and artillery projectiles (*id.*, § 2(B)(2)).

Kalodimos v. *Village of Morton Grove*, No. 81 CH 6424 (filed Aug. 10, 1981). On January 29, 1982, the Illinois circuit court issued an opinion rejecting petitioners' arguments concerning the state constitution and awarding summary judgment to Morton Grove. A copy of this opinion is included in the appendix, attached hereto, at A-1.

The *Kalodimos* plaintiffs appealed the state court's judgment to the Appellate Court of Illinois and moved the Supreme Court of Illinois to allow a direct appeal of the case in view of the "substantial public interest" of the case. (Motion for Direct Appeal to the Supreme Court, *Kalodimos* v. *Village of Morton Grove*, No. 56226 (Ill. Sup. Ct., filed Feb. 9, 1982)). On February 19, 1982, the Illinois Supreme Court declined to allow a direct appeal.

The Illinois Appellate Court then heard the *Kalodimos* appeal, and, on February 9, 1983, issued a unanimous opinion affirming the circuit court's judgment upholding the ordinance. The appellate court decision is reported at 113 Ill. App. 3d 488 and 447 N.E.2d 849. A copy is included in the attached appendix at A-10. The *Kalodimos* plaintiffs have petitioned the Illinois Supreme Court for leave to appeal the case further, but further review is discretionary. See Illinois Supreme Court Rule 315(a), Ill. Rev. Stat. ch. 110A, §315(a) (1981). Morton Grove has filed an opposition to the petition for leave to appeal.

SUMMARY OF ARGUMENT

The reasons given by petitioners in favor of this Court's review of the court of appeals' decision fall into three categories: Second Amendment considerations, the right of privacy in the home, and abstention. However, in each of these areas the court of appeals' decision followed established law; it does not conflict with any decision of this Court or of another court of appeals. At the same time, a reversal of the court of appeals' decision on the merits would work a profound change in the law and hamper the ability of state and local

government to deal with the crime and accidental injury associated with small firearms.

The Second Amendment. The Second Amendment to the United States Constitution was construed by this Court in *Presser* v. *Illinois*, 116 U.S. 252 (1886), as a limitation only on federal, not state or local, legislation. In *United States* v. *Miller*, 307 U.S. 174 (1939), this Court held that the Second Amendment prohibits only legislation that would impair the effectiveness of a state's militia. Neither of these holdings has been questioned in any subsequent decision, and both have been repeatedly applied by lower courts.

There is no reason to reexamine *Miller* or *Presser*. The history of the Second Amendment, contrary to petitioners' analyses, does reflect that it was designed to assure effective state militias, and not to provide for personal defense against criminals or the advancement of revolution. Preservation of an effective state militia, in turn, is a goal that cannot reasonably be imposed on an unwilling state and is not, in the modern United States, so implicit in the concept of ordered liberty as to require the incorporation of the Second Amendment into the due process clause of the Fourteenth Amendment. *Cf. Palko* v. *Connecticut*, 302 U.S. 319 (1937). In any event, because the Morton Grove ordinance in no way affects the state militia, this case provides no basis for reaching the incorporation issue.

Privacy in the home. There is no basis for petitioners' attempts to render the concept of domestic privacy a substantive provision of the Constitution, conferring a right to defend one's dwelling with specific types of weapons. The only remotely relevant authority, *Stanley* v. *Georgia*, 394 U.S. 557, 568 n.11 (1969), expressly states that its holding (regarding obscene material) "in no way infringes upon the power of the State or Federal Government to make possession of other items, such as . . . firearms . . . a crime."

Abstention. The doctrine of abstention announced by this Court in *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496

(1941), depends on the existence of an unsettled question of state law. The state law issue presented by petitioners in this case, the interpretation of a right to arms provision in the Illinois constitution (Article I, Section 22), is not unsettled. Prior to the enactment of the Morton Grove ordinance, Section 22 had been construed by the Illinois Appellate Court to disallow only a complete ban of all firearms and to place possession of arms in an "unprivileged position." *People* v. *Williams*, 60 Ill. App. 3d 726, 728, 377 N.E.2d 285, 286-87 (1978); *Rawlings* v. *Department of Law Enforcement*, 73 Ill. App. 3d 267, 275, 391 N.E.2d 758, 763 (1979). The appellate court in *Kalodimos*, and the courts below, likewise found Section 22 to accord only a limited right to some type of firearms, not a right to possess handguns.

Additionally, even if Section 22 had presented an unresolved legal issue, the courts below could have properly exercised their discretion not to abstain in view of (1) the need for a prompt determination of the enforceability of the Morton Grove ordinance and (2) the parties' voluntary submission of the issues to the federal courts. Finally, because the *Kalodimos* case has already been presented to the Illinois Supreme Court (which need not accept the case), the issue may well become moot before this Court could consider it.

ARGUMENT

I. In Rejecting Petitioners' Second Amendment Arguments, the Courts Below Followed Well Recognized and Long Settled Decisions of This Court, Which There is No Reason to Reconsider.

The principal issue raised by each of the petitioners is whether the Morton Grove ordinance violates the Second Amendment to the United States Constitution.[2] The courts below found that the ordinance was not in conflict with the

[2]The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

Second Amendment on the basis of two decisions of this Court: *Presser* v. *Illinois*, 116 U.S. 252 (1886) and *United States* v. *Miller*, 307 U.S. 174 (1939). Both of these decisions have been uniformly followed and were correctly applied. Petitioners have shown no reason why either should be reconsidered.

A. *Presser* v. *Illinois* And *United States* v. *Miller* Govern This Case.

In *Presser* v. *Illinois*, this Court rejected a claim that the Second Amendment was infringed by a state law prohibiting members of private associations from parading with arms. The Court ruled:

> "[A] conclusive answer to the contention that this amendment prohibits the legislation in question lies in the fact that the amendment is a limitation only upon the power of Congress and the National government, and not upon that of the states."

116 U.S. at 265. The Court also rejected claims (1) that a right to bear arms was one of the attributes of citizenship incorporated in the privileges and immunities clause of the Fourteenth Amendment (116 U.S. at 266-67) and (2) that the state legislation violated the due process clause of that amendment (116 U.S. at 268).

In the courts below, petitioners attempted to limit the impact of the holding of *Presser*, but they have abandoned that effort in this Court. Petitioners now frankly seek to have *Presser* overruled (or "revisited") on the ground that it does not comport with more modern incorporation analysis. Quilici Pet. 5, Stengl Pet. 4, Reichert Pet. 10-15. However, petitioners do not deny that *Presser* has been uniformly accepted by every court that has considered the question of whether the Second Amendment applies to state or local legislation. The decisions reading *Presser* to reject Second Amendment challenges to such legislation include *Cases* v. *United States*, 131 F.2d 921-22 (1st Cir. 1942), *cert. denied sub nom. Velaquez* v. *United States*, 319 U.S. 770 (1943); *Engblom* v.

Carey, 522 F. Supp. 57, 71 (S.D.N.Y. 1981) *aff'd in part and rev'd in part*, 677 F.2d 957 (2d Cir. 1982); *Eckert* v. *City of Philadelphia*, 329 F. Supp. 845 (E.D. Pa. 1971), *aff'd mem.*, 474 F.2d 1339 (3d Cir. 1972), *cert. denied*, 410 U.S. 989 (1973); *State* v. *Swanton*, 129 Ariz. 131, 629 P.2d 98, 99 (Ariz. App. 1981); *State* v. *Amos*, 343 So. 2d 166, 168 (La. 1977); *Commonwealth* v. *Davis*, 369 Mass. 886, 890, 343 N.E.2d 847, 850 (1976); *In re Atkinson*, 291 N.W.2d 396, 398 n.1 (Minn. 1980); *Harris* v. *State*, 83 Nev. 404, 406, 432 P.2d 929, 930 (1967); *State* v. *Sanne*, 116 N.H. 583, 364 A.2d 630 (1976). Thus, whatever the merits of petitioners' arguments that *Presser* should be overruled, it must be recognized that such a result would overturn a well established principle of law.

The same situation exists with respect to *United States* v. *Miller*. In *Miller*, this Court determined that the Second Amendment must be interpreted, consistently with its introductory declaration, to preserve the effectiveness of state militias. 307 U.S. at 178.[3] Thus, the Court refused to invalidate a federal statute prohibiting transportation in interstate commerce of an unregistered sawed-off shotgun, finding that such a weapon was not shown to have any "reasonable relationship to the preservation or efficiency of a well-regulated militia." *Id.*

Petitioners attempt to limit *Miller* to a holding that sawed-off shotguns are not military equipment (Stengl Pet. 16, Reichert Pet. 15-16), but the interpretation given by *Miller* to the Second Amendment plainly goes beyond that holding.

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[3] The Court stated: "The Constitution as originally adopted granted to the Congress power—'To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States [. . . .]' U.S.C.A. Const. art. 1, § 8. *With obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view.*" 307 U.S. at 178 (emphasis added).

Just as certain weapons might be banned, consistently with the Second Amendment, because they are not necessary for the preservation or efficiency of a militia, so might certain persons—children, incompetents, felons—be barred from possessing weapons, because they are unqualified to serve in the militia. In either situation, the legislation would not impair the militia, and so, under *Miller*, would not violate the Second Amendment.[4]

The interpretation of *Miller*, limiting the Second Amendment to preservation of the militia, has also been uniformly followed. *United States* v. *Oakes*, 564 F.2d 384, 387 (10th Cir. 1977), *cert. denied*, 435 U.S. 926 (1978); *United States* v. *Warin*, 530 F.2d 103 (6th Cir.), *cert. denied*, 426 U.S. 948 (1976); *United States* v. *Johnson*, 497 F.2d 548, 550 (4th Cir. 1974); *Cody* v. *United States*, 460 F.2d 34, 36-37 (8th Cir.), *cert. denied*, 409 U.S. 1010 (1972); *United States* v. *Gross*, 313 F.Supp. 1330, 1334 (S.D. Ind. 1970) *aff'd*, 451 F.2d 1355 (7th Cir. 1971); *Brown* v. *City of Chicago*, 42 Ill. 2d 501, 504, 250 N.E.2d 129, 131 (1969); *State* v. *Rupp*, 282 N.W.2d 125, 130 (Iowa 1979); *State* v. *Skinner*, 189 Neb. 457, 458, 203 N.W.2d 161, 162 (1973); *Burton* v. *Sills*, 53 N.J. 86, 248 A.2d 521 (1968), *appeal dismissed*, 394 U.S. 812 (1969).

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[4]Thus, *United States* v. *Tot*, 131 F.2d 261, 266-67 (3d Cir. 1942), *rev'd on other grounds*, 319 U.S. 463 (1943) upheld a conviction for receipt of a firearm in interstate commerce by a person previously convicted of a crime of violence. The court reasoned:

> "One could hardly argue seriously that a limitation upon the privilege of possessing weapons was unconstitutional when applied to a mental patient of the maniac type. The same would be true if the possessor were a child of immature years. In the situation at bar Congress has prohibited the receipt of weapons from interstate transactions by persons who have . . . been shown to be aggressors against society. Such a classification is entirely reasonable and does not infringe upon the preservation of the well regulated militia protected by the Second Amendment." (Footnote omitted.)

Under the interpretation set forth in *Miller*, the Morton Grove ordinance would not violate the Second Amendment, even if the amendment were applicable to local regulation, because the ordinance has no impact whatever on the state militia.

First, the ordinance does not apply to on-duty members of the Illinois National Guard, which is the organized militia of the state. Ill. Rev. Stat. ch. 129, § 220.05 (1981); Ordinance § 2(E)(3). Second, the concealable weapons affected by the ordinance must realistically be viewed as primarily serving other than militia purposes. Cf. *State* v. *Workman*, 35 W. Va. 367, 373, 14 S.E. 9, 11 (1891).[5] Third, even if such weapons are viewed as military equipment, the Morton Grove ordinance prohibits no one from owning, possessing, and becoming proficient in their use, provided only that the weapons be stored and used at a licensed gun club. Ordinance §§ 2(E)(7) and 2(E)(10). To the extent that it has any bearing on the militia in Illinois, residents of Morton Grove are fully able to become experts in the use of handguns.

Thus, as with *Presser*, the petitioners must argue that *Miller* was wrongly decided by this Court, and that a proper interpretation of the Second Amendment would require enforcement of a right to arms not only for preservation of state militias but also for personal self-defense (Reichert Pet. 16-17) or modern revolutionary activities (Stengl Pet. 17-19). Such arguments, again, can only be accepted at the cost of overturning a well established and consistent body of law.

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[5] The *Workman* court held that the Second Amendment "must be held to refer to the weapons of warfare to be used by the militia, such as swords, guns, rifles, and muskets,—arms to be used in defending the state and civil liberty,—and not to pistols, bowie-knives, brass knuckles, billies, and such other weapons as are usually used in brawls, streetfights, duels, and affrays. . . ."

B. There Is No Reason To Reconsider *Presser* Or *Miller*.

The Stengl and Reichert petitions present arguments attacking the holdings of *Presser* v. *Illinois* and *United States* v. *Miller*, but these arguments provide no basis for any change in the law.

The Stengl petition focuses on *Miller*, arguing that preservation of the militia was only one of the purposes of the Second Amendment and that the amendment should be interpreted (contrary to *Miller*) to protect a right to possess arms for personal defense against "foreign invasion, domestic tyrants, or felonious attackers." (Stengl Pet. 5-6.) The primary flaw in this argument is that it fails to explain why the Second Amendment declares only the necessity of a militia as the reason for its guarantee. If a general right to arms, for a variety of individual purposes, had been intended, the amendment's declaration would be misleading surplussage.

Additionally, the Stengl argument ignores the historical context of the Second Amendment. The amendment was adopted, not out of solicitude for a right to revolution or fear that citizens might be left without means of self-defense, but as a result of concern that the new federal government might, by disuse of its power to train and equip the state militias (U.S. Const. Art. I, § 8), effectively disband them, and impose a standing army on the country. Feller & Gotting, *The Second Amendment, A Second Look*, 61 Nw. U.L. Rev. 46, 59-60 (1966); Weatherup, *Standing Armies and Armed Citizens, An Historical Analysis of the Second Amendment*, 2 Hastings Const. L.Q. 961, 984-93 (1972); Note, *The Right to Keep and Bear Arms*, 26 Drake L. Rev. 423, 430-32 (1977).[6]

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[6]Typical of these concerns are the following remarks of George Mason, an anti-federalist leader at the Virginia ratifying convention:

> "There are various ways of destroying the militia. A standing army may be perpetually established in their stead. I abominate and detest the idea of a government,

(footnote continued on next page)

The distrust of standing armies and a preference for defense by militias during peace time was one of the major themes in American political thought in the period of the Revolutionary War. See Weatherup, *supra*, 2 Hastings Const. L.Q. at 977-78. The Declaration of Independence lists among the causes of the revolution the British practice of stationing large standing armies in colonies, 1 Schwartz, *The Bill of Rights: A Documentary History* 253 (1971), and several of the state constitutions adopted prior to the constitutional convention of the United States contained provisions condemning a standing army, promoting the militia, or both.[7]

(footnote continued from preceding page)

> where there is a standing army. The militia may be here destroyed by that method which has been practises in other parts of the world before; that is, by rendering them useless by disarming them. Under various pretenses, Congress may neglect to provide for arming and disciplining the militia; and the state governments cannot do it, for Congress has an exclusive right to arm them. . ." 3 Elliot, *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 379-80 (2d ed. 1836) *reprinted in* Weatherup, *supra*, 2 Hastings Const. L.Q. at 991.

[7]The prototype of these provisions was the Declaration of Rights in the 1776 Constitution of Virginia, which included the following Article 13:

> "That a well-regulated Militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free State; that Standing Armies, in time of peace, should be avoided, as dangerous to liberty; and that, in all cases, the military should be under strict subordination to and governed by the civil power."

1 Schwartz, *The Bill of Rights: A Documentary History* 239 (1971). Delaware and Maryland followed the Virginia formula, *id.*, at 278 and 282; South Carolina simply provided that "the military be subordinate to the civil power of the State," *id.*, at 335; and New Hampshire stated that "[a] well regulated militia is the proper, natural, and sure defense of a state," *id.*, at 378. North Carolina promoted the continuation of the militia by according

(footnote continued on next page)

In contrast, there is little indication of any interest in protecting a right to weapons for purposes other than militia service. Although state militias might ordinarily have been composed of citizens bearing their own arms (Stengl pet. 15-16), the Articles of Confederation, Art. VI, called for the newly independent states themselves to supply the necessary arms and ammunition. Only one of the early state constitutions, that of Pennsylvania, accorded a right of the people to bear arms "for the defense of themselves" as well as the state, 1 Schwartz, *The Bill of Rights: A Documentary History* 266, and a proposal by Thomas Jefferson to include in the Virginia Declaration of Rights a provision that "[n]o freeman shall be debarred the use of arms" was not adopted, *id.*, at 245, 232. Most importantly, nothing in the reported congressional debates on the adoption of the Second Amendment reflects any interest in a right to arms for any purpose other than service in the militia.

Finally, the Stengl argument, insofar as it is premised on a supposed right to revolution, contradicts this Court's holding in *Dennis* v. *United States*, 341 U.S. 494, 501 (1951), that no such right exists:

> "We reject any principle of governmental helplessness in the face of preparation for revolution, which principle, carried to its logical conclusion, must lead to anarchy."

Nor does the Stengl petition explain why, if interpretation of the Second Amendment is to be based on a right to revolution, items such as grenades, machine guns, and bazookas would not be subject to the amendment's protection.

The Reichert petition focuses its argument on *Presser* v. *Illinois*, asserting that modern incorporation doctrine

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a right to bear arms "for the defence of the state," and Massachusetts provided a right to keep and bear arms "for the common defence"; both states also condemned standing armies. *Id.*, at 287, 342-43.

requires a reversal of the rule that the Second Amendment is inapplicable to the states. (Reichert pet. 10-15.) However, although interpretation of the Fourteenth Amendment has certainly changed since *Presser* was decided, there is no reason for concluding that the ruling in *Presser* would change as a result.

As the court of appeals noted below, 695 F.2d at 270, this Court has rejected the proposition that each provision of the Bill of Rights applies to the states through incorporation in the due process clause of the Fourteenth Amendment. *Adamson* v. *California*, 332 U.S. 46 (1947), *overruled on other grounds, Malloy* v. *Hogan*, 378 U.S. 1 (1964). Rather, the Court has examined provisions of the Bill of Rights individually, to determine the extent to which they embody fundamental rights essential to liberty and justice. *Palko* v. *Connecticut*, 302 U.S. 319, 326 (1937), *overruled on other grounds, Benton* v. *Maryland*, 395 U.S. 784 (1969). The Reichert petition ignores this individual approach, assuming that because most of the other provisions of the first eight amendments have been incorporated, the Second Amendment surely must be. (*See* Reichert Pet. 13.)[8]

Yet the Second Amendment is unique in that, as this Court held in *Miller,* it was specifically directed against encroachment on a state institution, the militia. The Amendment plainly assumes a state government actively interested in advancing the militia: the provision that the militia not be disarmed in no way assures that states will make the expenditures necessary to organize and train an armed force. Thus, the protection of the Second Amendment is only sensible if it is directed against an external and superior threat to the

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[8] Significant provisions of the bill of rights continue to apply only to the federal government. *Watson* v. *Jago*, 558 F.2d 330 (6th Cir. 1977) (right to indictment by grand jury under Fifth Amendment); *Iacaponi* v. *New Amsterdam Casualty Co.*, 258 F. Supp. 880 (W.D. Pa. 1966), *aff'd,* 379 F.2d 311 (3d Cir. 1967), *cert. denied,* 389 U.S. 1054 (1968) (right to civil jury trial under Seventh Amendment).

militia, the federal government. Cf. L. Tribe, *American Constitutional Law* 226 n.6 (1978).

In fact, the states have largely surrendered the independence of their militias. Under the federal statutes governing National Guard the federal government has assumed responsibility for arming the organized state militias, 32 U.S.C. §§ 106, 701, and providing for their training, 32 U.S.C. §§ 501, 502. At the same time, a standing army has become a permanent and necessary element of the peace time defense of this country. *See* Feller & Gotting, *supra*, at 69. Thus, the Second Amendment, in promoting the militia, cannot be held to embody any right so implicit in American liberty that it must be enforced against the states as an element of due process.

Finally, even if the Second Amendment could reasonably be interpreted to protect state militias from state government, the present case would provide no basis for considering the issue, since the Morton Grove ordinance does not impair the operation of the militia in any way. See p. 10, above.

II. There Is No Basis For Petitioners' Suggestion That The Privacy Interests Protected By The Constitution Include A Right To Possess Firearms In The Home.

Each of the petitions in this matter proposes that the special status accorded to the home under Anglo-American law should result in a rule of constitutional law that possession of handguns must be allowed within the home. (Quilici Pet. 6, Stengl Pet. 21-24, Reichert Pet. 14-15.) The suggestion is groundless.

The privacy of the home is unquestionably accorded certain protection by the Constitution. Principally, the Fourth Amendment protects the home against warrantless entries and unreasonable searches. *Payton* v. *New York*, 445 U.S. 573, 585-86 (1980). Additionally, certain personal conduct, relating to procreation and the family, and ordinarily occurring within the home, has been protected under a constitutional right of privacy, arising from the penumbra of specific constitutional guarantees. *Griswold* v. *Connecticut*,

381 U.S. 479, 484-85 (1965). However, none of these principles makes the home a modern philosopher's stone, capable of transforming items of contraband into objects of constitutional protection.

There appears to be only one decision of this Court in which the Constitution was found to protect possession within the home of material that could properly be prohibited outside the home. That decision is *Stanley* v. *Georgia*, 394 U.S. 557 (1969), heavily relied on by the Stengl petition (at 21, 24). Yet, in holding that possession of obscene material within the home could not be constitutionally prohibited, the Court in *Stanley* expressly relied on the connection between putatively obscene material and the freedom of speech protected by the First Amendment. The Court expressly declined to extend its holding to items of contraband other than obscenity.

> "We hold that the First and Fourteenth Amendments prohibit making the mere private possession of obscene material a crime.
>
> * * *
>
> What we have said in no way infringes upon the power of the State or Federal Government to make possession of other items, such as narcotics, *firearms*, or stolen goods, a crime. . . . No First Amendment rights are involved in most statutes making mere possession criminal." (Emphasis added.)

394 U.S. at 568, 568 n.11. Thus, laws prohibiting possession and use of marijuana in the home have been repeatedly upheld against challenges based on *Stanley*. *Leary* v. *United States*, 544 F.2d 1266, 1270 (5th Cir. 1977); *United States* v. *Drotar*, 416 F.2d 914, 917 (5th Cir. 1969), *vacated on other grounds*, 402 U.S. 939 (1971); *Illinois Norml, Inc.* v. *Scott*, 66 Ill. App.3d 633, 636, 383 N.E.2d 1330, 1332 (1st Dist. 1978).

The other authorities cited in the Reichert petition (at 14) are old English judicial decisions authorizing the use of firearms in the home pursuant to statutes in effect at the time of the decisions. These cases have no bearing on the state of English law under other statutory schemes. There

was never any absolute right to arms in England, and England ultimately enacted one of the strictest gun control laws in the world. 1 Edw. 8 & 1 Geo. 6, ch. 12, § 30 (1937). See Feller & Gotting, *The Second Amendment, A Second Look*, 61 Nw. U.L. Rev. 46, 49 n.10 (1966).[9]

In the end, petitioners' arguments on the privacy of the home are an invitation to this Court to create a new limitation on the ability of state and local government to deal with the pressing social problem of firearm-related crime and injury. As the Reichert petition notes (at 10), a number of communities have expressed interest in adopting legislation similar to the Morton Grove ordinance. Other local governments, such as the City of Chicago, have determined to limit firearm possession through restrictive registration. Municipal Code of Chicago, ch. 11.1 and 11.2 (1982); cf. New York Penal Laws § 400.00 (1982).

These efforts to control firearm proliferation should not be lightly interfered with by the courts. As this Court noted in *Whalen* v. *Roe*, 429 U.S. 589, 597 (1977):

> "State legislation which has some effect on individual liberty or privacy may not be held unconstitutional simply because a court finds it unnecessary, in whole or in part. For we have frequently recognized that individual States have broad latitude in experimenting with possible solutions to problems of vital local concern." (Footnotes omitted.)

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[9] The Stengl petition (at 6 n.12) erroneously states that Blackstone considered a right to arms as among "the absolute rights of individuals". Blackstone actually defined the common law "right to arms" as the "right of the subject . . . of having arms for their [sic] defence *suitable to their condition and degree, and such as are allowed by law.*" 1 W. Blackstone, *Commentaries* *143-44 (emphasis added). Blackstone specifically listed this right to arms as the last of a group of "auxiliary" or "subordinate" rights in contrast to "the principal absolute rights" of "personal security, personal liberty, and private property." *Id.* at *140-41.

In this context, the Court reiterated the warning of Mr. Justice Brandeis in *New State Ice Co.* v. *Liebman*, 285 U.S. 262, 311 (1932) (dissenting opinion):

> "Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. * * * But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles."

The warning is fully applicable here.

III. The Decision of The Courts Below Not to Abstain From Exercising Jurisdiction Was in Full Accord With Established Principles.

The remaining issue raised by the petitions is whether the courts below were required, under the doctrine of *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496 (1941), to abstain from exercising jurisdiction over petitioners' complaints until the Illinois Supreme Court was afforded an opportunity to determine whether the Morton Grove ordinance violated Article I, Section 22 of the 1970 Illinois Constitution.[10] This issue is argued only in the Reichert petition (at 6-10). The Quilici petition does not raise the issue, and the Stengl petition declines to address it, observing that the claims under Section 22 "will probably be decided by the state supreme court before this Court can act." (Stengl pet. 4.)

Indeed, one of the principal reasons why this Court should not grant certiorari to consider the abstention issue is that the issue will likely become moot. The *Kalodimos* case, which

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[10] Section 22 provides: "Subject only to the police power, the right of the individual citizen to keep and bear arms shall not be infringed."

raises petitioners' state constitutional claims, is presently pending before the Illinois Supreme Court, fully briefed on petition for leave to appeal. (See p. 4, above.) The Illinois Supreme Court may, in its discretion, deny leave to appeal without further proceedings. Illinois Supreme Court Rule 315(a), Ill. Rev. Stat. ch. 110A, § 315(a)(1981). Even if leave to appeal is granted, the case would proceed in the Illinois Supreme Court no less promptly than the present cases in this Court. See Illinois Supreme Court Rule 315(g), Ill. Rev. Stat. ch. 110A, § 315(g) (1981).

Moreover, the abstention decisions of the courts below were correct. *Pullman* abstention is appropriate only if potentially dispositive questions of state law are unresolved. *Examining Board of Engineers, Architects & Surveyors* v. *De Otero*, 426 U.S. 572, 598 (1976); *Harman* v. *Forssenius*, 380 U.S. 528, 534 (1965). Thus, in *Reetz* v. *Bozanich*, 397 U.S. 82, 86 (1970), the principal authority cited in the *Reichert* petition, this Court vacated a decision enjoining enforcement of state statutes and regulations as violative of the Fourteenth Amendment and the Alaska Constitution, because the Alaska constitutional provisions had "never been interpreted by an Alaska court." 397 U.S. at 86. The other authorities cited by the Reichert petition involved state law issues which were similarly unsettled.

That is not the situation presented here. As the district court below noted (Mem. Op. and Order, Aug. 20, 1981 at 2; Reichert Pet. 73a), Article I, Section 22 of the Illinois Constitution had been interpreted at least twice by Illinois courts. *Rawlings* v. *Department of Law Enforcement*, 73 Ill. App. 3d 267, 391 N.E.2d 758 (3d Dist. 1979); *People* v. *Williams*, 60 Ill. App. 3d 726, 377 N.E.2d 285 (1st Dist. 1978). Both decisions upheld statutes challenged under Section 22 because the statutes did not constitute a total ban on the possession of all arms, *e.g.*, *Williams*, 60 Ill. App. 3d at 728, 377 N.E.2d at 286-87, the same interpretation of Section 22 applied by the district court and by the court of appeals. 532 F. Supp. at

1176, 695 F.2d at 267.[11] The Illinois courts that have already ruled in the *Kalodimos* case unanimously reached the same result. See A-7, A-12 to A-13. The meaning of Section 22 is not unsettled.

Furthermore, abstention is an equitable doctrine, *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 328-29 (1964), and here, on several grounds, the equities are weighted heavily against abstention. First, the procedures employed by the petitioners reflect a waiver of abstention claims. Both the *Stengl* and *Reichert* petitioners voluntarily submitted their state law claims to the federal courts by filing complaints in the district court. Their cases were not removed. Indeed, the *Stengl* case was filed on July 20, 1981, one week before the issue of abstention was raised in the district court and three weeks before the *Reichert* appellants filed their state court case.[12] Although it is true that the *Reichert* appellants did not file their federal action until their state case had been stayed, nothing forced them to file in federal court; they were free to pursue their state claims in the Illinois courts when the stay was lifted, and they have done so. Having voluntarily submitted their state claims to federal courts, the *Stengl* and *Reichert* appellants waived their abstention arguments. *See First Savings & Loan Association of Boston* v. *Greenwald*, 591 F.2d 417, 424-25 (1st Cir. 1979). The remaining petitioner, Victor Quilici, did not request the court of appeals to abstain and did not urge the district court's refusal to abstain as error on appeal.

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[11] Contrary to the assertion in the *Reichert* petition (at 7), the dissenting opinion in the court of appeals expresses no disagreement with the majority's interpretation of Section 22. The dissent's only argument involving the Illinois Constitution was that the Morton Grove ordinance exceeded the home rule powers elsewhere accorded by that constitution. See 695 F.2d at 275.

[12] The *Stengl* appellants never pursued their state claims in the Illinois courts and elected not to join Quilici's abstention motion in the district court.

Second, as the court of appeals correctly noted, any conflict between the state and federal systems is greatly reduced when state officials bring a case to federal court. *See Southwest Airlines Co.* v. *Texas International Airlines*, 546 F.2d 84, 93 (5th Cir.), *cert. denied*, 434 U.S. 832 (1977). The *Reichert* petition asserts that Illinois has an interest in having its courts determine whether Morton Grove's ordinance violated Section 22. (Reichert Pet. 7.) However, abstention seeks, in major part, to avoid unnecessary friction with state sovereigns. *Pullman*, 312 U.S. at 501. Here, the state "sovereign" brought one of the cases to federal court and the parties now seeking abstention brought the others. The grant or denial of abstention did not obstruct or displace the Illinois courts' authority to decide the validity of the Morton Grove ordinance in the separate lawsuit pending in the state courts.

Finally, it was certainly appropriate for the court of appeals to consider the public importance of the subject matter of this case in determining not to require full litigation through the Illinois judicial system before allowing resolution by the federal courts.[13] The delay resulting from abstention is a factor to be considered in any case, *Bellotti* v. *Baird*, 428 U.S. 132, 150 (1976), and where, as here, issues of significant public concern are at stake, this delay may properly influence a court's exercise of discretion. *Cf. Procunier* v. *Martinez*, 416 U.S. 396, 402 (1974) (refusing to require abstention in case of claimed deprivation of First Amendment right of expression); *Harman* v. *Forssenius*, 380 U.S. 528, 537 (1965) (same, voting rights).

There is no abstention issue raised by the decisions below that justifies this Court's review.

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[13]There is no procedure for certification of legal questions to the Illinois Supreme Court, see *Wynn* v. *Carey*, 582 F.2d 1375, 1382 (7th Cir. 1978), and that court has declined to accept direct review of the state court decision upholding the Morton Grove ordinance. See p. 4, above.

CONCLUSION

For the reasons stated above, the petitions for writ of certiorari should be denied.

Respectfully submitted,

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Dated: July 15, 1983

In The

Circuit Court of Cook County, Illinois
County Department—Chancery Division

MICHAEL KALODIMOS, GEORGE L. REICHERT, ROBERT E. METLER, and RICHARD A. SCHNELL, *Plaintiffs,* vs. VILLAGE OF MORTON GROVE, an Illinois Municipal Corporation, *Defendant.*	No.: 81 Ch 6424

MEMORANDUM OF LAW AND ORDER

This cause coming on to be heard on Plaintiffs' motion for Preliminary Injunction and Plaintiffs' and Defendant's cross motions for Summary Judgment pursuant to § 57 of the Illinois Civil Practice Act, Ill. Rev. Stat., ch. 110, § 57 (1981), the parties having appeared through their respective counsel and the Court having heard the arguments of counsel, and being fully advised in the premises issues the following memorandum of law and order:

Nature of the Case

The single issue in this case is the constitutionality, under Article I, section 22 of the 1970 Illinois Constitution, of Village of Morton Grove, Illinois, Ordinance No. 81-11, "An Ordinance Regulating the Possession of Firearms and Other Dangerous Weapons," enacted June 8, 1981. (Appended hereto.)

The Ordinance, as stated in its preamble, is designed to limit the easy availability of certain types of firearms and weapons which are believed to have increased the potentiality for firearm-related deaths and injuries in the Village. The challenge to the Ordinance is based upon its prohibition of the class of weapons commonly referred to as "handguns."

Article I, section 22 of the 1970 Illinois Constitution provides:

> "Subject only to the police power, the right of the individual citizen to keep and bear arms shall not be infringed."

It is the position of the plaintiffs that the ban on "handguns" by the Village effectively nullifies the section 22 right to bear arms. In defense of its action, the Village states that the Ordinance is a reasonable exercise of its police power to protect the public health, safety and welfare of its citizens.

Memorandum of Law

In order to determine whether a particular Constitutional provision is being abrogated, it is necessary to first construe its meaning. By all relevant criteria, section 22 can be construed to provide a right to bear arms which is conditioned upon the reasonable exercise of state and local legislative police power.

The plain meaning of the language of section 22 is the starting point in construing the provision. Each word will be given its common and ordinary meaning unless a contrary meaning is clearly evident. *Coalition for Political Honesty* v. *State Board of Elections,* 65 Ill. 2d 453, 464, 359 N.E.2d 138, 143 (1977). Using this rule, section 22 provides a right to bear arms of a non-specified type, conditioned upon legislative action.

The use of an introductory phrase does not change the plain meaning construction. The plaintiffs urge that the introductory phrase, "subject only to the police power", is

superfluous and secondary to the "right to bear arms." In construing the constitution, one clause will not be allowed to defeat another if by the use of a reasonable interpretation the two can be made to stand together. *Oak Park Federal Savings & Loan Assn.* v. *Village of Oak Park,* 54 Ill. 2d 200, 296 N.E.2d 344 (1973). It is important to render every word operative rather than rendering some words idle and nugatory. 1 Cooley's Constitutional Limitations 128 (8th ed. 1927); 2 J. Sutherland, Statutes and Statutory Construction, sec. 4705 (3d ed. 1943). Likewise, a subtle construction for the purpose of limiting the operation of the language must be avoided. *U.S. ex rel. Hoover* v. *Elsea,* 501 F. Supp. 83, 88 (N.D. Ill. 1980). The two clauses of section 22 read together using a plain meaning construction provide for a conditional right to bear arms in Illinois.

A second method of constitutional construction is a determination of the intent of the framers of the provision in question. *Client Follow-Up Company* v. *Hynes,* 75 Ill. 2d 208, 216, 390 N.E.2d 847, 850 (1979). A review of the majority report submitted by the Committee which proposed the section is a reliable method of determining this intent. *Id.* at 216-17, 390 N.E. 2d at 850. The report of the Committee on the Bill of Rights which proposed section 22 states in pertinent part:

> This provision affirms the right of the individual citizen to possess and use arms, including firearms. It also makes explicit the principle that this right is not absolute, but is subject to regulations required by the safety and good order of society.

VI Record of Proceedings, Sixth Illinois Constitutional Convention 84, (1970) [hereinafter cited as Proceedings]. This Committee report gives a clear guide to the proposal which was ultimately adopted by the convention. It must be given considerable weight in determining the understanding of the majority of convention delegates who adopted the provision and the report. *Coalition for Political Honesty* v.

State Board of Elections, 65 Ill. 2d 453, 467-71, 359 N.E.2d 138 145-47 (1977).

The constitutional convention debates themselves are useful only to the extent that they indicate the consensus of the delegates. *Paper Supply Co.* v. *City of Chicago,* 57 Ill. 2d 553, 570, 317 N.E.2d 3, 12 (1974). Isolated comments made during the debates do not indicate a consensus, merely a particular concern of a particular delegate. *People ex rel. Cosentino* v. *County of Adams,* 82 Ill. 2d 565, 570-71, 413 N.E.2d 870, 872 (1980). As recently restated in *Cosentino,* " 'It is possible to lift from the constitutional debates on almost any provision statements by a delegate or a few delegates which will support a particular proposition; however, such a discussion by a few does not establish the intent or understanding of the convention.' " 82 Ill. 2d at 569, 413 N.E.2d at 871, citing *Client Follow-Up Co.* v. *Hynes,* 75 Ill. 2d 208, 221, 390 N.E.2d 847, 852 (1979). The initial case construing a provision of the 1970 Illinois Constitution, *People ex rel. Scott* v. *Grivette,* 50 Ill. 2d 156, 161-62, 277 N.E.2d 881, 885 (1972), expressed the view that the intent of the delegates should be considered as it was manifested in the consensus of debate and the adoption of the section following argument.

The delegates who considered section 22 had before them the language and Committee Report and had heard the explanations given by the spokesman for that committee. See III Proceedings at 1686-1706. Their adoption of the section as proposed expressly indicates a majority agreement with both the language of the section and the Report. This Court thus places its reliance upon the language of the section as proposed and adopted and the explanation of the section provided in the Committee Report.

Plaintiffs urge that the right given in the second clause of section 22 is taken away by an exercise of the first clause, the police power. The Committee, however, in its Report saw fit to explain the use of the first phrase and its parameters. The Report states that the phrase is designed to make explicit that the right to bear arms is conditional. VI Proceedings at

88. Indeed, the Illinois courts, both prior to and following the 1970 constitutional provision, have recognized the right to bear arms as a conditional right. The Committee Report cited *Biffer* v. *City of Chicago,* 278 Ill. 562, 570, 116 N.E. 182, 195 (1916), for the proposition that the state may regulate the use of weapons by means of its police power without infringing the right to bear arms. Also cited was *Brown* v. *City of Chicago,* 42 Ill.2d 501, 504, 250 N.E.2d 129, 131 (1969), upholding a gun registration ordinance on the same grounds. Following ratification of section 22, the constitutionality of local ordinances was considered. In two recent cases, the courts recognized that the right to bear arms was conditioned upon the exercise of the police power of the state. *People* v. *Williams,* 60 Ill. App.3d 726, 728, 377 N.E.2d 285, 287 (1978); *People* v. *Graves,* 23 Ill. App.3d 762, 320 N.E.2d 95, 98 (1974).

It is apparent from both the language of section 22 and the Committee Report that the framers of the provision intended the right to bear arms as a conditional right subject to the exercise of the police power.

In addition to the above criteria for constitutional construction, it is important to consider the understanding which the voters had at the time of ratification. *People ex rel. Cosentino* v. *County of Adams,* 82 Ill.2d 565, 569-70, 413 N.E.2d 870, 871-72 (1980). The language of the official explanation provided directly to each voter prior to ratification is the most reliable determinant of their common understanding. *Id.* at 569, 413 N.E.2d at 871. Plaintiffs argue that a consideration of media coverage prior to ratification is a means of determining the voter's understanding of section 22. It is recognized that statements by state officials widely reported in the media concerning constitutional provisions may indicate the information that was considered by voters prior to ratification. *Client Follow-Up Co.* v. *Hynes,* 75 Ill.2d 208, 390 N.E.2d 847 (1979); *Wolfson* v. *Avery,* 6 Ill.2d 78, 126 N.E.2d 701 (1955). In this case, however, plaintiffs rely upon a single newspaper article published prior to ratification which merely restates the official explanation of the provision.

The Court finds that it is the official explanation itself which must be relied upon. That explanation is as follows:

> This new section states that the right of the citizen to keep and bear arms cannot be infringed, except as the exercise of this right may be regulated by appropriate laws to safeguard the welfare of the community.

Official Text, Proposed 1970 Constitution for the State of Illinois 5 (1970); see also VII Proceedings at 2689. This explanation followed the actual test of section 22. It was couched in language from the Committee Report and in conjunction with the text was intended as an explanation of the conditional right to bear arms.

The clear language of section 22, the intent of its framers and the intent of the voters who ratified it all point to the conclusion that the right to bear arms in Illinois is conditioned upon the reasonable exercise of the police power. It is the aspect of reasonableness that must be the focus of any attack upon a local ordinance such as that enacted by the Village of Morton Grove.

The standard by which the reasonableness of a local ordinance is tested was most recently defined in *City of Carbondale* v. *Brewster,* 78 Ill.2d 111, 114-15, 398 N.E.2d 829, 831 (1979), *appeal dismissed,* 446 U.S. 931 (1980). A valid exercise of police power must relate to protection of the public health, safety, morals, and general welfare or convenience and must be a reasonable method by which to accomplish such objective. *Id.* at 115, 398 N.E.2d at 831. The test for reasonableness has been stated as a question of "whether the ends sought to be achieved are proper for invocation of the police power and whether the means utilized to achieve those ends are reasonable." *Rawlings* v. *Illinois Dept. of Law Enforcement,* 73 Ill. App.3d 267, 273, 391 N.E.2d 758, 762 (1979).

The possession and use of firearms has consistently been held to be a proper subject for exercise of the police power in Illinois. *Brown* v. *City of Chicago,* 42 Ill.2d 501, 250 N.E.2d

129 (1969); *Biffer* v. *City of Chicago,* 278 Ill. 562, 116 N.E. 182 (1917); *Rawlings* v. *Illinois Dept. of Law Enforcement,* 73 Ill. App.3d 267, 391 N.E.2d 758 (1979); *People* v. *Williams,* 60 Ill. App.3d 726, 377 N.E.2d 285 (1978); *People* v. *Graves,* 23 Ill. App.3d 762, 320 N.E.2d 95 (1974). The only inquiry necessary is whether the Village of Morton Grove Ordinance 81-11 is a resaonable exercise of this power.

The Village has broad discretion to determine what its public safety and welfare problems are and the means it will use to address them. *City of Carbondale* v. *Brewster,* 78 Ill.2d 111, 115, 398 N.E.2d 829, 831 (1979), *appeal dismissed,* 446 U.S. 931 (1980). Where, as in this case, there is a difference of opinion as to the measures which should be taken, that controversy does not cause the measure to fail. *Id.* at 115, 398 N.E.2d at 831. It is within the discretion of the elected officials of the Village to define a problem and seek a solution. The preamble of the Ordinance defines the problem as "the easy and convenient availability of certain types of firearms and weapons [which] have increased the potentiality of firearms related deaths and injuries;. . ." Village of Morton Grove, Illinois, Ordinance No. 81-11, preamble, par. 2 (1981) [hereinafter cited as Ordinance].

The Ordinance is limited in scope to certain classifications of weapons which the Village believes "play a major role in the commission of homicide, aggravated assault, and armed robbery, and accidental injury and death." Ordinance preamble, par. 3. The Ordinance does not, on its face or as a practical matter, nullify the right of the citizen to bear arms in defense of person and property in the Village. The measure targets one type of arm, the "handgun," for control. The individual is free, subject of course to any existing state regulations, to possess and use another type of arm.

The Court recognizes that a considerable difference of opinion exists concerning the cause of the problem addressed in the Ordinance and therefore, the solution to the problem. However, it is within the discretion of the elected officials of the Village of Morton Grove to determine their public health

and safety problems and take the steps they believe will effectively address those problems. The Court will not disturb the regulation simply because of a difference of opinion as to its wisdom, necessity and expediency. *City of Carbondale* v. *Brewster,* 78 Ill.2d 111, 115, 398 N.E.2d 829, 831 (1979), *appeal dismissed,* 446 U.S. 931 (1980).

Plaintiffs correctly state that local ordinances could be enacted which would have the effect of varying the section 22 right to arms based on one's location in the state. Plaintiff fails to argue for state preemption of this field of legislation. At no time has the power of the Village to enact legislation on this subject been raised.

It is not disputed that a "handgun" is an arm within the meaning of section 22. It is argued that the type of weapon subject to the Ordinance, the "handgun," is entitled to special constitutional protection. The cases relied upon for this proposition do not concern ordinances such as the one in question. For example, the court in *In Re Brickey,* 8 Idaho 597, 70 P. 609 (1902), struck a local ordinance which totally prohibited the carrying of all firearms. The Morton Grove Ordinance bans only a single type of firearm.

Plaintiffs cite *People* v. *Zerillo,* 210 Mich. 635, 189 N.E. 927 (1922), for its special treatment of hand-type arms. An important distinction between the regulation which was struck and the Ordinance in question here is that the Michigan law was subject to the arbitrary enforcement of local officials. In addition, a particular class of persons was denied access to the weapons. No such discretion or arbitrary discrimination is provided for in this case. The Ordinance provides only for certain well-defined exceptions to the ban.

The Village of Morton Grove Ordinance represents a valid exercise of police power regulation. The public health and safety problem was defined and measures limited in scope were designed to address the problem. Neither the express language of section 22 nor the intent of the framers and voters of the state are contravened by the Ordinance.

ORDER

Based upon the above memorandum of law, it is hereby ordered that:

1. Plaintiffs' motion for Preliminary Injunction is denied;
2. Plaintiffs' motion for Summary Judgment is denied;
3. Defendant's motion for Summary Judgment is granted;
4. Any Stay of Ordinance No. 8011 imposed by this Court is herewith lifted;
5. No just cause is presented to delay appeal of this matter.

DATED: January 29, 1982

ENTER:

(signed) ALBERT GREEN
Judge

Third Division Filed 2-9-83

No. 82-282

MICHAEL KALODIMOS,
GEORGE L. REICHERT,
ROBERT E. METLER, and
RICHARD A. SCHNELL,

Plaintiffs-Appellants,

v.

VILLAGE OF MORTON GROVE,
an Illinois Municipal Corporation,

Defendant-Appellee.

Appeal from the Circuit Court of Cook County.

Honorable
Albert Green
Presiding

PRESIDING JUSTICE McNAMARA delivered the opinion of the court:

Plaintiffs, Michael Kalodimos, George L. Reichert, Robert Metler, and Richard A. Schnell, filed this suit for declaratory and injunctive relief challenging the constitutionality of defendant Village of Morton Grove's Ordinance 81-11, "An Ordinance Regulating the Possession of Firearms & Other Dangerous Weapons." Plaintiffs appeal from the trial court's decision granting defendant's cross motion for summary judgment in which the validity of the ordinance was upheld, and denying plaintiffs' motion for summary judgment.

The ordinance in question provides that "[n]o person shall possess, in the Village of Morton Grove *** [a]ny handgun, unless the same has been rendered permanently inoperative." The ordinance specifies various exceptions for certain categories of persons such as peace officers, prison officials, members of armed forces and national guard, and, under certain conditions, licensed gun collectors. Plaintiffs, residents of Morton Grove who own and possess operative handguns and who fall within none of the exceptions, charge that the ordinance is invalid because it infringes upon the right of the individual citizen to keep and bear arms as

guaranteed by Article I, Section 22 of the 1970 Illinois Constitution.

Section 22 provides that "[s]ubject only to the police power, the right of the individual citizen to keep and bear arms shall not be infringed." In construing section 22 the trial court relied primarily upon the plain meaning of its language, the majority report submitted to the delegates by the committee which proposed the section to the constitutional convention, and on the official explanation which accompanied the proposed constitutional provision on its submission to Illinois voters. The trial court found the handgun to be an arm within the meaning of section 22. Noting that individuals were free to possess other types of arms, however, the trial court found the Morton Grove ordinance to be a reasonable exercise of the village's police power.

On appeal, plaintiffs contend that the plain meaning of section 22, as understood by both the drafters and the voters, establishes that it guarantees the right to keep a handgun. That right, plaintiffs argue, is subject to reasonable regulation, not prohibition, pursuant to the police power. They therefore urge that we find the ordinance in question to be an unreasonable and improper exercise of police power in that it operates to nullify a constitutional guarantee.

Both sides agree that handguns are included within the class of arms protected by section 22. Their point of contention is whether a ban on handguns alone is a proper exercise of local power where citizens are free to possess other types of protected arms.

Plaintiffs correctly assert that the true inquiry in interpreting a constitutional provision concerns the common understanding of that provision by the voters who, by their vote, gave life to the provision. (*People ex rel. Cosentino* v. *County of Adams* (1980), 82 Ill.2d 565, 413 N.E.2d 870.) We find, however, that in the present case, examination of the most reliable determinants of that common understanding leaves unresolved the issue with which we are concerned.

The official explanation merely asserts that "the right of the citizen to keep and bear arms cannot be infringed, except as the exercise of this right may be regulated by appropriate laws to safeguard the welfare of the community." (7 Record of Proceedings, Sixth Illinois Constitutional Convention 2689 (Proceedings).) This explanation provides no more guidance than does the plain language of section 22 in helping to determine whether such regulation may include a prohibition against one category of protected arms.

Similarly, plaintiffs' reliance on the majority report of the Bill of Rights Committee is misplaced. Plaintiffs argue that the report, which was presented by the majority of the committee who proposed section 22 to the delegates prior to their debates, indicates that both the members of the committee and the other delegates understood section 22 to preclude a ban on the possession of handguns. The portion of the report on which plaintiffs rely provides:

> "[T]he proposed new provision *** seeks to assure that the 'arms' involved are not limited by the armaments or needs of the state militia or other military body. The substance of the right is that a citizen has the right to possess and make reasonable use of arms that law-abiding persons commonly employ for purposes of recreation or the protection of person and property. Laws that attempted to ban all possession or use of such arms, or laws that subjected possession or use of such arms to regulations or taxes so onerous that all possession or use was effectively banned, would be invalid." (6 Proceedings 87.)

While the language clearly indicates that handguns are within the type of arms protected by section 22, it does not clearly preclude a ban on handguns absent a ban on other protected arms. Indeed, the report also notes the "extraordinary threat to the safety and good order of society" posed by the possession of arms and recites that in response to that threat section 22 would provide for an "extraordinary degree

of control" over the possession of arms pursuant to the police power. (6 Proceedings 88.)

Since the meaning accorded section 22 is otherwise doubtful with regard to the extent of control permissible under the police power, it is appropriate to consult the debates of the delegates to the constitutional convention to ascertain the intent of the drafters. (*Drury* v. *County of McLean* (1982), 89 Ill.2d 417, 433 N.E.2d 666.) This approach was recently used by the Federal Court in *Quilici* v. *Village of Morton Grove*, Nos. 82-1045, 1076, 1132 (7th Cir., Dec. 6, 1982), where it upheld the constitutionality of the same ordinance in question here. Finding the language of section 22 to be unclear, the court based its interpretation of the section on the constitutional debates. It concluded that section 22 grants only the right to possess arms, not handguns. While finding that the framers intended handguns to be within the class of protected arms, it also found the framers to have envisioned that a permissible exercise of police power might include a prohibition on handguns. We believe that this interpretation of section 22 is amply supported by the debates and we adopt the reasoning expressed by the seventh circuit.

We reject plaintiffs' contention that the debates regarding the present issue are confusing, contradictory and inherently unreliable. Conversely, we find that they demonstrated a consensus among the delegates with regard to the scope of protection accorded handguns pursuant to section 22 and the extent to which that protection is limited by the police power.

In explaining section 22 to the delegates, Delegate Foster specifically asserted the majority view that "under this provision, the state would have the right to prohibit some classes of firearms, such as war weapons, handguns, or some other category." (3 Proceedings 1687.) This view was reiterated throughout the debates, (3 Proceedings 1688, 1689, 1693, 1718), the consensus of the majority being that, although section 22 "would prevent a complete ban on all guns. ***

there could be a ban on certain categories." (3 Proceedings 1693.) Although some delegates who supported the majority view expressed a preference for a stronger right to arms which would have precluded such a ban (3 Proceedings 1704, 1707), no delegate indicated that he so interpreted section 22 as it was proposed and ratified.

Even the minority delegates favored the interpretation given by the majority. Their concern was that the language, which they viewed as ambiguous, might be misinterpreted by the courts and result in the invalidation of the type of arms regulation with which we are concerned in the present case. (3 Proceedings 1693, 1694, 1695, 1709.) While recognizing that a ban on handguns probably would be upheld by the courts, the minority was reluctant to take that risk. (3 Proceedings 1693, 1694). Fearing that the effect of the majority proposal could possibly "be to limit, in some indefinite and unpredictable fashion, the power of the legislature to pass whatever laws are needed in this field to protect the public safety," the minority preferred omitting entirely from the constitution any provision purporting to guarantee a right to bear arms. 3 Proceedings 1696, 1697.

The debates thus convince us that the framers intended that a ban on handguns be a permissible exercise of the police power pursuant to section 22. Although the explanation given the voters was less clear in this regard, we find no indication that the common understanding of the voters was contrary to that of the framers.

We reject plaintiffs' contention that this interpretation of section 22 renders illusory the right to arms. While we agree with plaintiffs that gun control legislation could vary from municipality to municipality, we find that the framers envisioned this kind of local control. Such variations would not render the right illusory because the citizens of each municipality would retain the right to bear some type of arms.

We also reject plaintiffs' contention that the ordinance in question was an unreasonable exercise of the police power. A municipality has broad discretion to determine not only what the interests of the public welfare require but what measures are necessary to secure those interests. We will not disturb an exercise of police power merely because there is room for a difference of opinion as to its wisdom or necessity. (*City of Carbondale* v. *Brewster* (1979), 78 Ill.2d 111, 398 N.E.2d 829.) In the present case, the purpose of the ordinance in question, "to promote and protect the health and safety and welfare of the public" (Village of Morton Grove Ordinance 81-11), is certainly a proper interest for the exercise of police power. (*City of Carbondale* v. *Brewster*.) Furthermore, we find that the means adopted, a ban on handguns, constituted a reasonable means of promoting that interest. See *Rawlings* v. *Illinois Dept. of Law Enforcement* (1979), 73 Ill. App.3d 267, 391 N.E.2d 758.

For the foregoing reasons, the judgment of the circuit court of Cook County upholding the validity of the Morton Grove ordinance is affirmed.

Judgment affirmed.
McGILLICUDDY and
WHITE, J.J. concur.